FILED
JAN 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-167

UNITED STATES,

Petitioner,

v.

CHARLES W. RAMSEY and JAMES W. KELLY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT JAMES W. KELLY

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BRIEF FOR RESPONDENT JAMES W. KELLY

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether probable cause and a search warrant are required before customs officials may open letter-class mail entering the United States from abroad, when they suspect that the letter-class mail contains smuggled goods.

STATEMENT OF THE CASE

We accept the Government's statement of the case but we add one statement. After the seizure in New York of the eight envelopes which were opened without a search warrant, the authorities there alerted the authorities in Washington, D.C., and the latter authorities then sought and obtained search warrants for three similar envelopes which were being detained at the Washington, D.C. Main Post Office, before they opened those three other envelopes. (A. 80-81; see Pet. App. 17a)

SUMMARY OF ARGUMENT

The issue involved here is presented to this Court for the first time. Are probable cause and a search warrant required before Government agents may open letter-class mail entering this country from abroad, when they suspect that the letter-class mail contains contraband? This issue, though going to the heart of our Constitutional protections, has no history supporting the Government's position, because it was not until 1971 that Customs officials were authorized to open such mail without the consent of the addressee. If there is a meaningful history, it speaks in favor of respondents, because the pertinent statute (which was enacted in 1866) purported to authorize the opening of "envelopes" without consent, yet for 105 years—until 1971—that authorization was not utilized by the Government.

This case involves the convergence of Fourth Amendment and First Amendment interests, thereby heightening—perhaps to its greatest point—the protection attempted to be insured by the Fourth

Amendment. The Court is concerned here with letter mail, or what may be letter mail, and this means that our most personal, our most cherished, our most private thoughts and ideas may be involved. As Mr. Justice Holmes put it, dissenting in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921), "The use of the mail is almost as much a part of free speech as the right to use our tongues."

A search and seizure without a warrant is, unless an exception can be shown, "unreasonable" per se within the meaning of the Fourth Amendment. The exceptions permitted by this Court are few and they are narrow; they are carefully defined. The Government's position here is that there is such an exception, and that it applies or should apply to letter mail. The Government stresses the exigencies of the situation, pressing on this Court (by citing statistics not contained in the record, not verifiable by respondents) the argument that unless an exception is granted here, Government agents cannot keep up with the flood of mail entering this country every year.

We do not concede that the Constitution does not operate at the border, as Petitioner seems to contend, but we limit our argument here to the issue before the Court—the issue of letter mail. Even if there is a "border search" exception for other things (including packages, as some lower courts have held), letters rise to a different level of Fourth Amendment protection; letters require a search warrant.

The contention that it is too burdensome to obtain a search warrant, that it is impracticable because of the limitations of personnel and funds, is a familiar one to this Court. The argument that the Constitution is (once again) interfering with the diligent enforcement of the laws is one that Mr. Justice Black used to greet by

saying that of course the Bill of Rights interfered with some efforts at law enforcement—that was its purpose. Or, as this Court said in *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973), the "needs of law enforcement stand in constant tension" with Constitutional protections against certain exercises of official power.

The immobility of letters, the power of the authorities (sanctioned in *United States v. Leeuwen*, 397 U.S. 249) to detain mail for a reasonable period in order to investigate the situation and then—if appropriate—to obtain a warrant, the use of trained dogs, X-ray machines, and other sophisticated methods of detecting contraband, all contribute to the conclusion that the protection afforded to letter mail by the Constitution far outweighs any burden placed on Government officials. We do not in any way decry the argument of the Government that a warrant requirement for letter mail would indeed make its burden greater, but we have no doubt that the burden can be met. It is instructive here that the authorities in Washington, D.C., alerted to the presence of similar envelopes in the Post Office, did what the authorities in New York did not do—they sought and obtained a warrant before they opened the additional envelopes.

Indeed, the record in this case shows that on the facts of this case itself, there was no emergency, no need to avoid the warrant requirement. The six envelopes opened here arrived at Kennedy Airport possibly on a Friday; they were not opened there but instead (for the convenience of the Government) were transported to the New York City General Post Office, at which they were inspected and opened on the following Monday. It is thus possible that the letter mail involved here spent 72 hours in the United States before being inspected and opened, thus eliminating

from the situation any "border search" notion of immediacy of action required to enforce the law.

ARGUMENT

Preface

The extra-record material contained in the Government's brief is improper and should be stricken

The Government's brief, pp. 24-35 and Appendix B, states and relies upon "facts" not contained in the record of this case, and it attributes these "facts" to sources unverifiable by us. Thus the Government says, pp. 24-25: "The Customs Service informs us that during each of fiscal years 1975 and 1976 more than one billion envelopes and 42 million packages entered the United States from abroad." Again, p. 26, the brief says that the "Customs Service informs us that in fiscal 1975 and again in fiscal 1976 the Postal Service referred for screening approximately 27 million envelopes . . ." Page 25 states that the Customs Service has 62 officers assigned to inspection of "envelopes;" footnote 22, p. 26, states that each officer must scrutinize about 1900 "envelopes" daily, or 240 each hour, and opens about 19 "envelopes" each day. Other such "facts" are sprinkled through the remainder of the brief and in Appendix B ("Source: Information supplied by the Customs Service.")

The reason for the Government to build its case around this kind of data, not contained in the record and not available in the form of official reports or other verifiable source, is clear. The Court of Appeals in the opinion below, said (Pet. App. 16a) that the Government had suggested that a warrant procedure

would be impracticable, but "there is absolutely nothing in the record to support this assertion." In an obvious attempt to cure this deficiency in the record, the Government has—at this level of the case—resorted to non-record materials.

The Government is attempting to intimidate the Court, to overwhelm it, by saying that the Customs Service has stated that "more than one billion envelopes" are entering the United States from abroad, etc. Our inability to check on this alleged fact is frustrating; this is an advantage that one litigant is not supposed to have over another, in our jurisprudence. But this is more than frustration. Our suspicion is aroused by the Government's use of the word "envelope" and the sentence (brief, p. 25): "Many of the envelopes are large, bulky and stiff, and they conceal their contents as well as does a cardboard box." At this point it begins to appear that the Government's one billion "envelopes" may have nothing to do with the case before the Court, which involves letter-type envelopes, embraced (as we will show) in the penumbra of the First Amendment. And indeed the Government then obligingly shows that its "envelopes" may be more like packages than like letters by defining the term in footnote 19, p. 25:

> "Envelopes, in the sense used in this brief, refers to all envelope-shaped mail of any postage rate, and not simply mail moving at international letter class rates."

Indeed, in the Memorandum for the United States in Opposition to the Motion to Strike (p. 5), responding to our joint motion to strike the brief, the Government says that the mail being analyzed here is divided into "envelopes" and "packages" on a "common sense" basis. It turns out that anything flatshaped is defined as an "envelope," and could be as large as 9 inches by 12

inches, and the envelope could be padded—in fact, the Government says (p. 5), an "envelope" could be as large as a small "Jiffy bag," which is defined as "a padded envelope, typically having two thicknesses of stiff paper on each side and a thin layer of foam or excelsior between." We note, in fact, in Appendix B of the Government's brief, that among the items found in what the Customs Service has informed the Department of Justice is "letter mail," as distinguished from "parcel mail," are weapons and switch-blade knives.

Since a principal concern of the opinion of the Court of Appeals in this case was for First Amendment values in what we customarily term "letters," containing one's private thoughts and communications, which will be a focal point of this brief as we develop the argument infra, it seems obvious that the Government is attempting to introduce matters alien to this case. An "envelope" that can contain a weapon or a switch-blade knife, an "envelope" that is really a Jiffy bag, is not what we commonly term a letter.

If we were able to cross-examine the proponents of the "one billion envelopes" figure and the other non-record data, as we ought to have a right to do, we might well be able to show the non-relevance of much of it. In stating the source as "the Customs Service informs us," the Government here is utilizing impermissible record sources and is preventing us from exposing any irrelevancies in the data.

On occasion the brief does not even attribute the non-record fact to "the Customs Service informs us" but simply states non-record matters as fact. Thus, for example, on page 25, we are told—without any citation or attribution—that dogs "can smell contraband only if it gives off discernible odors; . . . The odor of heroin is exceedingly faint, and it can be masked." We are told the physical limits of X-ray machines and trained dogs.

We know nothing of any of these alleged facts. They do not appear in any official report or in any publication of which judicial notice could be taken. They appear to be contained in some inter-office memorandum between the Department of Justice and the Customs Service. A brief in the Supreme Court of the United States, however, is not an inter-office memorandum.

By way of contrast, we point to decisions of this Court such as *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), in which the Court quotes estimates by the Government of the number of illegal immigrants in the United States. The figures differed widely, though only two years apart, but at least were ascertainable and were taken from official sources. One was from evidence supplied to a Congressional hearing; the other was taken from an Annual Report of the Immigration and Naturalization Service. See footnote 4 of the opinion. Footnote 12 of that opinion refers to sources such as the Census and other INS Annual Reports.

It is axiomatic in our jurisprudence that the record made in the trial court is sacrosanct. It cannot be supplemented, ex parte, at the appellate level, where the alleged new "facts" are in dispute as to their meaning and their relevancy and where they cannot be found in verifiable sources. These are not, as the Government claims, "Brandeis brief" data; these are not references to official reports or to published studies, or even to magazine articles or newspaper stories. These are unverifiable fighting facts, designed to influence the decision in this case, and should be subject to investigation and cross-examination. We protest the use of this material; we urge the Court not to consider it; we move that it be stricken from the Government's brief.

1. This case involves both Fourth Amendment and First Amendment rights

The Government has presented this case in its brief as if it contained only Fourth Amendment issues. Its only recognition that something more than the "unreasonableness" clause and the warrant clause of the Fourth Amendment are involved comes on pp. 29-32 where we are told that while the privacy interest in domestic communications by first class mail "is sufficient to require probable cause and a warrant before an envelope can be opened," yet "that requirement ought not to be extended" to letter class mail entering the country from abroad. Brief, p. 29. The Government goes on to tell us (p. 30) that one who wishes to guard against the reading of his international correspondence should take care to "send envelopes that are not so large or bulky that they give rise to suspicion that they contain something other than correspondence," but it also assures us solemnly that the appropriate regulation, 19 C.F.R. 145.3, provides that no correspondence may be read without a warrant, and this should amply provide a safeguard against the "chilling effect" (perceived by the Court of Appeals) that openings of letters may have on the expression of ideas.

It was just this latter point, the possibility of illegal reading of mail by Government agents and officers, that led the court below to comment pointedly on the fact, documented in official reports, that the Central Intelligence Agency did for some twenty years, from 1953 to 1973, do exactly that–it opened and read, without a warrant, international correspondence addressed to thousands of American citizens. The Federal Bureau of Investigation cooperated by giving the C.I.A. names and categories of persons and organizations in

whom it had an interest and whose mail it desired to be opened. The court below, saying that this Court has indicated that limits on search and seizure must be especially strong where First and Fourth Amendment values coincide, *United States v. United States District Court*, 407 U.S. 297 at 313-14 (1972), *Stanford v. Texas*, 379 U.S. 476, 485 (1965), said:

> The Court has also noted, with reference to the need to enforce Fourth Amendment protections, that "[h]istory abundantly documents the tendency of Government–however benevolent and benign its motives–to view with suspicion those who most fervently dispute its policies." 407 U.S. at 314. The recent disclosures about the widespread illegal searches of mail by United States intelligence agencies, see, e.g., REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES [THE ROCKEFELLER COMMISSION], June 1975, at 101-15, 168; S. Rep. No. 755, 94th Cong., 2d Sess., Book II, at 12, 17, 38, 62, 107-08 (1976); *id.*, Book 3, at 559-677; *Hearings before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong. 1st Sess. Vol 2, at 1-2, 15-16, 51-63, 66, 76 (1975); *id.*, Vol. 4 at 2, 4, 6-7, 10-11, 21-22, 31-35, 38, 43, 148, 150, 163; *id.*, Vol. 6, at 202-06, 367, highlight the importance of the Supreme Court's observation. (Pet. App. 12a)

The letters involved in this case were airmail letter class mail, the equivalent of "first class mail" (a phrase technically applied only to domestic mail–see A. 29, 32, 41). We are then, in this case, dealing with letters or what may be letters.

The Government throughout its brief stubbornly refuses to use the word "letter" and instead employs the word "envelope," presumably for fear that "letter"

will evoke–as it did for the court below–the consideration of First Amendment values as well as Fourth Amendment rights. Indeed, the Government's paranoia goes so far that in stating the First Circuit's reservation as to a "letter" (as opposed to packages) in *United States v. Emery*, 541 F.2d 887 at 889 (1976), the Government leaves off the quotation marks and changes the word "letter" into "envelope." Brief, pp. 10-11, n.6.

But it is *letters*, not envelopes, we are concerned with here. When letter-type mail arrives from abroad, it must constitutionally be presumed to contain what we commonly call a letter–that is to say, private correspondence–since "a search is not to be made legal by what it turns up," *United States v. Di Re*, 332 U.S. 581 at 595 (1948), and it will not avail the Government later to say that the search revealed that the envelope did not contain a letter. And as the court below said, in what may be the core of its opinion (Pet. App. 11a):

> Finally, and probably most important, letter mail is a vital means of communication in our society. Letters express the most important and sensitive of our personal, familial, political, professional, and financial affairs. They implicate both our deepest privacy and our interest in free expression, far more than packages or suitcases or automobiles. In the words of Justice Holmes, "the use of the mail is almost as much a part of free speech as the right to use our tongues." *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting), quoted with approval in *Blount v. Rizzi*, 400 U.S. 410, 416 (1971), and *United States v. Van Leeuwen*, supra, at 251.

We know that there is a First Amendment right to "receive information and ideas:"

> It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . ." *Martin v. City of Struthers*, 319 U.S. 141 . . . (1943) . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

We know, too, that the Fourth Amendment "gives concrete expression to a right of the people which 'is basic to a free society'." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

As in *United States v. United States District Court*, 407 U.S. at 313-314, there is in the case at bar "a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime . . . 'Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.' *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961)."

The question of "reasonableness" under the Fourth Amendment, posed by the Government (brief, p. 12), is thus not to be answered in this case by Fourth Amendment principles alone. In a case such as this, involving the Constitutional values of freedom of speech, freedom of correspondence, freedom of expression of views, it may well be "unreasonable" to utilize a warrantless search and seizure that might be "reasonable" in other situations.

The "reasonable expectation of privacy" principle may be another way of expressing the issue here. One has a "reasonable expectation of privacy" in a private home. *Weeks v. United States*, 232 U.S. 383 (1915). He has that same expectation of privacy even in a public telephone booth, and even though he is visible through the glass, *Katz v. United States*, 389 U.S. 347 (1967),

because as the Court said there, p. 351, "the Fourth Amendment protects people, not places." The Court's words in *Katz* as to the right of the defendant to private communication are instructive here (389 U.S. at 352):

> "No less than an individual in a business office, in a friend's apartment, or in a taxicab [citing cases], a person in a telephone booth may rely upon the protection of the Fourth Amendment . . . To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

And the Court struck down in *Katz* an electronic "search and seizure" which did not even involve physical penetration of the telephone booth, and even though the agents "did no more here than they might properly have done with prior judicial sanction," 389 U.S. at 356. We believe letter-mail rises to the same degree of "expectation of privacy" as a telephone conversation.[1]

The Government cites a number of cases, see brief at footnote 6, p. 10, for the proposition that every court other than the court below has held to the contrary of the decision below. That statement is not correct. At least three courts, in actions that are significant, felt it imperative to distinguish *letters* from *packages*—the very

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[1] It has been said, see *United States v. King*, 517 F.2d 350, 354 (5th Cir., 1975), that persons could have "no reasonable expectation that their letters, mailed from abroad, would remain uninspected." We do not agree with that, and we note that the court relied in part upon *United States v. Doe*, 472 F.2d 982, 985 (2d Cir., 1973). A glance at that page of the *Doe* case reveals that the court there said there could be no reasonable expectation of privacy "with regard to a large *package* mailed from a foreign country, which is represented to contain non-dutiable merchandise." (Emphasis added) Letters were not involved.

point made by the court below—and to reserve the question of letters, although they agreed that packages may be opened and searched without a warrant and without probable cause. Implicit in the distinction made by those courts is the First Amendment issue that springs to life when letters are involved. See *United States v. Emery*, 541 F.2d 887, 889 (1st Cir., 1976), saying: "We agree with the holding in *Odland* at least insofar as it concerns packages as opposed to first class letters;" *United States v. Swede*, 326 F. Supp. 533, 536 (S.D.N.Y., 1971), which categorized the mail before it as a "package," saying that "we do not determine whether the Constitution prevents the opening of letters, as opposed to packages containing merchandise, without a search warrant;" and see also *United States v. Sohnen*, 298 F. Supp. 51, 55 (E.D.N.Y., 1969), indicating that it might reach a different result where letters, rather than packages, were involved. In the *Sohnen* case, Judge Weinstein had before him a warrantless search of a sealed package containing twelve gold coins which had been mailed from Switzerland, and had been opened by Customs agents because "the weight and feel of the package were unusual and it did not bear a required label stating that it could be opened for customs inspection." 298 F. Supp. at 53. The court held that because the package lacked the required label, and (p. 55) "heft indicated the presence of some sort of heavy metal and spectroscopic examination revealed disc-shaped objects," the search did not exceed constitutional limits. Judge Weinstein reviewed the history of the "border search" exception, citing the well-known quotations from *Carroll v. United States*, 267 U.S. 132 (1925), and *Boyd v. United States*, 116 U.S. 616 (1886), quoted in the Government's brief here at pp. 13, 16) concerning the authority to conduct border searches without a warrant and without probable cause, much as the Government has done in this case, but then he said (298 F. Supp. at 55):

> "The Government's power to search international mail for customs purposes is not unlimited. The Constitution . . . may well prevent the opening of letters, as opposed to packages containing merchandise, without a search warrant."

Judge Weinstein went on to say that the Fourth Amendment's impact on searches of *merchandise* coming in from abroad is limited by the customs power "and the absence of any First Amendment interest."

The lower federal courts, then, have not been insensitive to the First Amendment implications of this case.[2]

2. The "Border Search" exception to the warrant requirement of the Fourth Amendment does not include letter-mail

The Government's contention is (brief, p. 33)

> that both history and compelling exigencies attending the enforcement of the customs laws dictate that customs authorities be permitted to open envelopes such as those involved in the instant case without any particularized suspicion that any given envelope contains dutiable items or contraband, and certainly without suspicion amounting to probable cause.

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[2] The only decisions which squarely hold that letters are subject to the "border search" exception to Fourth Amendment requirements, *United States v. King*, 517 F.2d 350 (5th Cir., 1975), *United States v. Odland*, 502 F.2d 148 (7th Cir., 1974), cert. den. 419 U.S. 1088, *United States v. Milroy*, 538 F.2d 1033 (4th Cir., 1976), cert. den. June 7, 1976, *United States v. Bolin*, 514 F.2d 554 (7th Cir., 1975), *United States v. Barclift*, 514 F.2d 1073 (9th Cir., 1975), do so without any apparent recognition that the First Amendment is involved in the determination of the issue.

Indeed the Government begins its argument (p. 12) with the naked assertion, devoid of any reference to prior cases of this Court, that the opening of the letters in this case was "justified by the single fact that the officer knew that the envelope was entering the United States from abroad."

This idea that the Constitution does not operate at the border, and that describing an intrusion into international letter mail as a "border search" removes it completely from the protection of the Fourth Amendment, finds no support in the decisions of this Court. And indeed, none is cited.

Nor is the issue primarily one of "reasonableness," as the Government seems to present it, under the "unreasonable searches and seizures" clause of the Fourth Amendment. This Court has consistently rejected attempts to eviscerate the totality of the Amendment. In *United States v. United States District Court*, 407 U.S. 297 (1972), the Court refused to accept the formulation that the relevant test was not whether it was "reasonable to procure a search warrant but whether the search was reasonable," saying:

> This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language . . . "It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency . . . *Coolidge v. New Hampshire*, 403 U.S., at 481 . . ."

A search and seizure without a warrant is, unless an exception can be shown, "unreasonable" per se within the meaning of the Fourth Amendment, *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967), and the Government must shoulder the burden of demonstrating to this Court the applicability of an exception, *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The Court has repeatedly stressed that the exceptions to the warrant requirement are indeed narrow in scope.

Coolidge v. New Hampshire, supra; *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Just the other day, January 12, 1977, in *G.M. Leasing Corp. v. United States*, ____ U.S. ____, 45 U.S. Law Week 4098 at 4102, the Court reaffirmed its statement in *Camara:*

> "[O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

The *G.M. Leasing* case unanimously held unconstitutional a warrantless search of books and papers even though a corporation (not an individual) was involved, and even though the search was made at an office (and not a home).

We concede, however, that the idea that a border search is exempt from the Constitution, from the Fourth Amendment, does indeed appear to be embedded in the cases in the lower courts. Even the court below seems to have accepted the view that there is a "border search exception" for searches of packages (Pet. App. 5a-6a) and for automobiles and persons (Pet. App. 7a), and that the only question in this case is whether or not letters are different.

We agree with the court below that letters *are* different; that letter mail presents issues, embraced in First Amendment protections, not found in other categories of objects being searched or seized; but we do not necessarily agree that there are areas in this country—the borders—in which the Constitution does not operate. As is said in the Note, *From Bags to Body Cavities; the Law of Border Search*, 74 Col. L. Rev. 53, 82 (1974):

> While it is dogma among the lower courts that border searches are immune from the traditional warrant requirement, there is no particular reason why this should be Border search is but one of several exceptions to the general rule that no search shall occur absent a magistrate's imprimatur. But these exceptions are not absolute; they are at least purportedly limited by the principle that "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." [Citing *United States v. United States District Court*, 407 U.S. 297, 318 (1972).]

It is not necessary, however, to address this issue in the case at bar. We are satisfied that even assuming arguendo the full force of a border search exception for other purposes, this case does not fall within it.

The Government states (brief, p. 15) that it relies upon 19 U.S.C. 482, which purports to authorize a Customs official "to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; . . ."[3]

The Government first contends that the argument from history supports its position here—that "border searches on less than probable cause are an accepted part of our constitutional heritage." This contention unfortunately gets off to a bad start by citing (brief, pp. 15-16) an alleged quotation from *Boyd v. United States*, 116 U.S. 616 (1886), as follows:

[3] In saying "wherever found," which may be nowhere near a border, and may in fact apply to trunks or envelopes that have never crossed a border, the statute obviously goes too far. Cf. the Border Patrol cases of this Court in areas removed from the border, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), *United States v. Ortiz*, 422 U.S. 891 (1975), *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

> The Court wrote in Boyd v. United States, supra, 116 U.S. at 623, that searches at the border for smuggled goods "are totally different things" from inland searches.

This Court said no such thing in *Boyd*, as is seen from the full quotation contained in the margin.[4] The *Boyd* case has nothing to do with warrantless border searches or with the border at all; it involved whether the seizure of Boyd's books and papers amounted to his compulsory production of evidence and thus a violation of his privilege against self-incrimination. Nor did the case have anything to do with letters or letter-type mail; it was concerned with the seizure of thirty-five cases of plate glass imported into the country.

We must comment, also, on the much-cited quotation (brief, p. 16) from *Carroll v. United States*, 267 U.S. 132 (1924), utilized frequently—as here—to support the claim that the border search exception has been recognized by this Court, on the ground of national self protection. In that quotation, after saying that it would be intolerable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, because persons lawfully within the country have a right to free passage without interruption or search, the Court said (pp. 153-4):

> Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in,

[4] The full quotation reads:

> The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof *are totally different things* from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. 116 U.S. at 623. (Emphasis added)

and his belongings as effects which may be lawfully brought in.

The quotation is accurate, but it is pure dictum. *Carroll* had nothing to do with the border at all, and a fortiori it had nothing to do with letter mail arriving at the border. It involved a police seizure of liquor by stopping an automobile traveling between Detroit and Grand Rapids in Michigan, and the only question was whether the warrantless seizure was made upon probable cause. Chief Justice Taft said (p. 149) that "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . .", and he cited, as does the Government (brief, p. 14) the fact that the First Congress, contemporaneously with adoption of the Fourth Amendment, enacted the first customs statute.

But that argument from history, upon which the Government relies so heavily (brief, pp. 13-24), and which the Government contends justifies a border search "without probable cause or a warrant" (brief, p. 14), is of no avail to the Government in this case. Aside from the point (mentioned by the court below, Pet. App. 7a, n.5) that this Court has not hesitated to abandon even a position based on history, *there is in fact no argument from history where letter mail is concerned.*[5] Indeed, the argument from history cuts against the Government on the issue of letter mail, as we shall show.

[5] Even as to non-letter mail, it has been said that there are at least three objections ot the argument that the virtually simultaneous adoption of the first customs statute and the Fourth Amendment shows that the Fourth Amendment was not to operate in a border search. See Note, *Border Searches and the Fourth Amendment*, 77 Yale L.J. 1007 at 1011 (1968), developing the three objections.

It appears that the authority to open "envelopes" was not contained in any border search statute until 1866, when Rev. Stat. §3061, the predecessor form of the present border search statute (19 U.S.C. 482), was adopted. But then, for 105 years, as the Government's brief frankly tells us, pp. 20-21, Customs officers did not open sealed letter mail despite the apparent authorization in the statute. Not until 1971, see pp. 21, 23-4, did Customs officials do what they have done in this case, that is, open sealed letter mail without a warrant and without the consent of the addressee.

The "history" on which the Government relies, then, is a history of some three years under the present regulations before the 1974 seizure in this case was made.[6] Against that history lie 105 years under the statute and indeed the 200 years of this country's independence, during which time no such seizures were ever made, so far as we are informed. On analysis, the Government's "history" turns out to involve packages, parcels, and other means of importing merchandise. The question of letter mail is before this Court for the first time.

We conclude this portion of the argument by saying that even if there were a well-established history of warrantless searches of letter mail, authorized by a statute, that would be of no avail to the Government if the Constitution required a warrant. As this Court has often said, "no Act of Congress can authorize a

[6] It will be noted that with one exception, all the cases cited by the Government (p. 10, n.6) as having "considered the problem" are of recent vintage, indeed within the last three years. The only earlier case cited, *United States v. Beckley*, 335 F.2d 86 (6th Cir.) is a 1964 decision and is cited only as "dictum." In fact, the *Beckley* case involved a package weighing between 9 and 10 pounds, on which less than first class postage was paid.

violation of the Constitution." *United States v. Brignoni-Ponce*, 422 U.S. 873 at 877 (1975), quoting from *Almeida-Sanchez v. United States*, 413 U.S. 266 at 272 (1973).

3. There is no reason to suspend or abrogate the warrant requirement for letter-mail

The Government, in addition to its argument from history, presses on this Court the point that "compelling practical considerations" justify the opening of letter mail arriving from abroad, "even in the absence of probable cause." (Brief, p. 24) It is at this point that the Government attempts to overwhelm the Court with the non-record statements, attributed to the Customs Service, that "over one billion envelopes and 42 million packages entered the United States from abroad," during each of the last two fiscal years (pp. 24-5), and with other non-record statements concerning the burden on Customs officers.

The Government's argument concerning the magnitude of the problem it confronts, while surely not to be taken lightly, is not a substitute for the Constitution. Similar arguments are often made by prosecutors complaining that the Bill of Rights was interfering with vigorous enforcement of the law; indeed, the present argument is reminiscent of the Government's contention in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), that the staggering numbers of aliens seeking to cross the long borders of the United States was so serious a problem, in terms of practicability, that roving non-border searches by the Border Patrol without warrant or probable cause or consent should be upheld. This Court replied, 413 U.S. at 273:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power.

The words "border search" convey an idea of a kind of emergency situation, a concept of persons or vehicles crossing the border with the Government agents having only a brief moment to check the possible breach of law, and with few or no facilities to aid the Government. The argument for a historic "border search" exception to the requirements of the Fourth Amendment includes Border Patrol cases, as well as Customs Service cases, and conjures up a picture of threatened incursions by hordes of aliens, requiring immediate action by Government officers.

How different in mood and in dynamics is the situation of letter mail, involved in this case. Letters are not mobile; they will lie there until Constitutional requirements are satisfied. There is no emergency. Indeed, this Court in *United States v. Van Leeuwen*, 397 U.S. 249 (1970), sustained the authority of Government officers to detain first class mail for a period of 29 hours while they investigated the situation and obtained a search warrant. International letter-class mail, as the court below said (Pet. App. 10a), would appear (in the light of the *Van Leeuwen* holding) to present an *a fortiori* case for the right of Customs officials to detain such mail, investigate it, and if appropriate obtain a warrant.

The mobility of the item to be seized, its ability to evade capture if not seized at that moment, has always been a cardinal underpinning of an exception to the warrant requirement. Thus in *Carroll v. United States*, 267 U.S. 132, 151 (1924), sustaining a warrantless seizure of liquor in a moving automobile, where probable cause existed, the Court said:

> Thus, contemporaneously with the adoption of the 4th Amendment, we find in the first Congress, and in the following second and fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods *in course of transportation and in a movable vessel, where they readily could be put out of reach of a search warrant.* (Emphasis added)

The Court added, significantly (267 U.S. at 156): "In cases where the securing of a warrant is reasonably practicable, it must be used, . . ."

Over and over, this Court has given that same answer where the Government, as it often does, tells the Court that the practicalities of the situation, or concerns for national security, or the burdens that obtaining a warrant would impose, excuse it from the warrant requirement. A classic formulation of that answer was given in *United States v. United States District Court*, 407 U.S. 297, 321 (1972):

> Thus we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values.

The Government presents to this Court, in effect, the proposition that since it cannot be determined from merely scrutinizing the outside of an "envelope" whether or not it is a "letter," the Government should at the border be permitted to open a suspicious-looking envelope and see what is inside. If what is inside is what we normally term a "letter," then the Government is sorry; it will not read the correspondence; it will (presumably) reseal the envelope

and send it on. We believe this stands the Fourth Amendment on its head, rendering the recipients of overseas mail second-class citizens. This amounts to a presumption in favor of the Government that the overseas mail is in violation of the law; therefore all individual recipients must suffer. But, "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). The true rule is that the presumption is in favor of the individual; the Fourth Amendment protects him at all times, enhanced in cases such as this by the First Amendment; and letter-type mail addressed to him must be presumed to be "a letter." The Government, in seeking to defeat that presumption, must do so with the aid of a search warrant.

The Government has attempted, brief, p. 11, to de-fang the warrantless search here by telling the Court what this case "does not involve," and says that (since the search here "took place at a post office as the mail was entering the United States") the case does not raise any issue of whether that post office was the border or the "functional equivalent" of the border. But in fact the situation is not that simple. The letters involved in this case came into the country at Kennedy Airport, concededly the functional equivalent of the border, but Officer Kallnischkies, the Customs Officer who inspected the mail, was not working at the Airport; he worked in the General Post Office in New York City, and it was there—after the mail had been transferred from the Airport—that he opened and inspected the letters. (A. 29-30) In fact, Officer Kallnischkies had nine persons working under him at Kennedy Airport (in addition to nine others working under him at the General Post Office, A. 20), and thus the eight letters

involved in this case could have been inspected at the Airport. But they were transported to New York City, for the convenience of the Government, and that process might have been accomplished in one day or it might have taken longer, depending on various factors. (A. 38)

The letters were opened on Monday, February 4, 1974. (A. 44) But they arrived at the General Post Office on Saturday or at the latest on Sunday and were held there over the weekend. (A. 44) The Customs staff works a Monday to Friday week, and mail arriving on Saturday or Sunday is held for Monday inspection. (A. 45)

Putting these facts together, it is possible that the letters arrived at Kennedy Airport on Friday, were transported to the General Post Office over the weekend, and thus spent three days in the United States before being inspected by the Customs officials. That amounts to perhaps 72 hours, almost three times as much time as the 29 hours permitted by this Court in *United States v. Van Leeuwen*, 397 U.S. 249 (1970), for detaining first class mail in order to investigate and then obtain a search warrant. What is significant about the *Van Leeuwen* decision is the distinction it makes between the *detention* of the packages for 29 hours, which was the "only thing done here on the basis of suspicion," 397 U.S. at 252, and the *opening* of the packages, which was done only after a warrant was obtained. The Court said that no interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day they were deposited.

> The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained. 397 U.S. at 253.

The idea, then, of an emergency in this case, of a need to proceed without complying with the warrant requirement–in short, the entire justification for a "border search" exception–turns out to be nonexistent on the actual facts of the case.

Particularly instructive here is the decision of this Court in *United States v. United States District Court*, 407 U.S. 297 (1972). That was the case in which the Attorney General had authorized electronic surveillance (wiretaps) in internal security matters without obtaining prior judicial approval. The question answered (in the negative) in the case was the issue posed and reserved in *Katz v. United States*, 389 U.S. 347 at 358, n.23 (1968):

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security . . .

Mr. Justice Powell pointed out, 407 U.S. at 299, that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees" and said in language applicable to the case at bar:

> This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.

The "determination of this question," said the Court (407 U.S. at 309), "requires the essential Fourth Amendment inquiry into the 'reasonableness' of the search and seizure in question, and the way in which that 'reasonableness' derives content and meaning through reference to the warrant clause. Coolidge v. New Hampshire, 403 U.S. 443, 473-484, . . ."

The Government contended (in an argument parallel to the argument here) that the covertness and complexity of potential unlawful conduct, and the use by many conspirators of the telephone, made electronic surveillance an effective investigatory weapon, and that the Government is obligated to employ its electronic capability to preserve the security of the country. The Court said (407 U.S. at 312):

> But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy.

The Court held without dissent that the Fourth Amendment does require prior judicial approval for domestic wiretapping, even in internal security matters; that the Government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy and free expression; and that Fourth Amendment freedoms cannot properly be guaranteed if these surveillances are left solely to the discretion of the executive branch without the detached judgment of a neutral magistrate.

An important and inextricable part of the Court's decision, indeed the underpinning of the case, as in the case at bar, was the fact that First Amendment values ("constitutionally protected speech," 407 U.S. at 313) as well as Fourth Amendment rights were involved. "Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech." 407 U.S. at 320.

If we change, mutatis mutandis, the "national security" aspects of *United States v. United States District Court* into the "border search" aspect of this case, as a reason given for suspending Fourth Amendment requirements, we have almost an exact parallel. We should have the same result, implementing what this Court said in *Ex Parte Jackson*, 96 U.S. 727, 733 (1877):

> The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation. . . .

The Government's argument that it is impracticable to obtain search warrants for the great numbers of letters or letter-type envelopes that come in from abroad, a type of argument that is (as we have said) unfamiliar to this Court only in its particular setting of letter mail, not only encounters the legal barriers described above but also suffers seriously as to credibility upon the basis of the facts contained in this record. After the eight envelopes (the basis for the convictions here) were opened in New York without a warrant, three similar envelopes were forwarded to Washington, and the authorities in Washington were alerted. But before the authorities in Washington would open those envelopes, *they sought and obtained a search warrant*, having detained the envelopes for that purpose. (A. 80-81)

Indeed, we must also question the Government's answer to the suggestion of the Court of Appeals in this case (Pet. App. 16a) that not only is there nothing in the record to demonstrate the "impracticability" of obtaining a warrant for suspected letter mail, but there are actually available now a sufficient number of

devices or methods to detect narcotics in international letter mail, or at least to reduce the problem to manageable levels. The Court of Appeals mentioned "X-ray inspection, metal detectors, specially trained dogs, and the like," and suggested a streamlined method of presenting suspected mail to a magistrate (possibly on an oral record), who might—if the traffic warranted—even be stationed at border places where the mail is heaviest, such as Kennedy Airport or the New York Post Office. The Government, while not denying the availability of these methods, described them as having "limited value in detecting contraband" (brief, p. 25), and called it "speculation" for the Court of Appeals to state that trained dogs, metal detectors, and other devices could detect contraband more easily in envelopes than in packages (brief, p. 29).

As we noted at the beginning of this brief, the Government's statements concerning the efficacy of these methods have no basis in the record of this case. But we call to the attention of this Court the fact that the Solicitor General, as is shown in Exhibit 1 appended to this brief, supplied to counsel for the respondents a substantial number of Custom Service Forms 151, "reflecting seizures from both envelopes and packages" (as the Solicitor General's letter put it.[7] The fact is that each of the Forms 151 supplied to us shows that a trained dog sniffed out the contraband, from both "envelopes" and parcels. The contraband found in envelopes included hashish (sometimes in a cassette, or a plastic bag, or wrapped in writing paper,

[7] It is interesting to note that while the Solicitor General's letter (Exhibit 1) uses the term "envelopes," Form 151 itself—according to the code to be used—reflects "letter class" (designated by the letter L), and all of the 20 Forms 151 described by the Solicitor General as referring to "envelopes" are in fact coded "L".

or even wrapped in aluminum foil and wax paper); in parcels, it included marihuana inside a fruitcake tin, or in a plastic wrapping within a cardboard box; it included "amphetamines and unknown pills contained in plastic packets," or hidden in dried food material; it included marihuana inside a hollowed book sealed in plastic wrappings, or inside a hassock, or rolled in the center of a newspaper. We refrain from printing the many Forms 151 summarized above.

If trained dogs alone can detect contraband concealed in the manners shown above, and doubtless in many other ways, we believe—as the Court of Appeals believed—that the problem of practicability is far from the dilemma urged upon this Court by the Government. We agree with the court below that the problem is entirely manageable within Constitutional limits.

CONCLUSION

The judgment of the court of appeals should be sustained.

Respectfully submitted,

IRVING R. M. PANZER
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Attorney for Respondent
James W. Kelly
(Appointed by this Court)

Office of the Solicitor General
Washington, D.C. 20530

December 17, 1976

Allen M. Palmer, Esq.
1707 N Street, N.W.
Washington, D.C. 20036

Re: United States v. Ramsey and Kelly, S. Ct. No. 76-167, October Term 1976

Dear Mr. Palmer:

In response to your letter of December 9, 1976, requesting copies of Customs Service Form 151, I asked the Customs Service to provide me with a number of these forms reflecting seizures from both envelopes and packages. The Customs Service has provided this material, and I am enclosing with this letter 16 Forms 151 reflecting seizures from parcels and 20 Forms 151 reflecting seizures from envelopes. The Customs Service has deleted from these forms material that might be used to identify the sender or intended recipient of the mail. These deletions have been made in conformity with the Privacy Act, but they should not hinder the use of the Forms you have in mind.

Each Form 151 contains the name of the customs officer who made the seizure and the name of his supervisor. The Customs Service has informed me that it has no objection if you desire to talk to any of these employees. You should feel free to reach them by telephone at the customs facility indicated on the face of the forms.

Sincerely,

BY HAND
Enclosures

Robert H. Bork
Solicitor General

cc: Irving R. M. Panzer, Esq.
1735 DeSales Street, N.W.
Washington, D.C. 20036

EXHIBIT 1